

## ASHBY & GEDDES

ATTORNEYS AND COUNSELLORS AT LAW  
500 DELAWARE AVENUE  
P. O. BOX 1150  
WILMINGTON, DELAWARE 19899

TELEPHONE  
302-654-1888  
FACSIMILE  
302-654-2067

November 8, 2007

The Honorable Mary Pat Thyng  
United States District Court  
844 N. King Street  
Wilmington, DE 19801

VIA ELECTRONIC FILING

Re: *Sepracor, Inc. v. Dey, L.P. and Dey, Inc.*  
C.A. No. 06-113-\*\*\* (MPT); (Consolidated)

This letter responds to letter briefs filed on behalf of Sepracor, Inc. ("Sepracor") and Breath Limited ("Breath") in anticipation of the November 9, 2007 conference call with the Court. As explained in those letters, Breath seeks production of Dey, L.P. and Dey, Inc.'s (collectively "Dey's") expert reports, which have been designated as confidential pursuant to the terms of the protective order in this case.

Breath, the first to file an ANDA on levalbuterol inhalation solutions, has failed to provide any reason why it should be entitled to Dey's expert reports on the issues of noninfringement, invalidity, and unenforceability. While Dey has invested considerable resources in working with its experts to formulate its theories as to noninfringement, invalidity, and inequitable conduct, Dey will turn over those expert reports provided: (1) Dey is able to redact its confidential information; and (2) Breath agrees to provide their expert reports to Dey.

On Tuesday November 6, 2007, Dey learned that Breath additionally seeks the documents that Sepracor's expert, Edward Thwaite, "considered" in preparing his expert report. Those documents include the confidential deposition transcript of Colin Chan, Dey's Senior Director of Business Development, the confidential deposition transcript of Mr. Chan as Dey's 30(b)(6) witness, and deposition Exhibits 49, 59, 60, and 74, which are similarly designated as confidential. *See* Ex. A (letter from Jayson Wolfgang to Elizabeth Leff, dated November 6, 2007); Ex. B (letter from Sharon Davis to Barbara Webb Walker, dated November 5, 2007).

As Mr. Chan's title suggests, his deposition and the exhibits he discussed dealt with issues that are of the highest level of confidentiality, including:

- How Dey identifies, selects, funds, and develops its generic products;

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- How Dey's Senior Management team interacts, communicates and obtains approval from Merck Generics' senior management team for products to develop;
- Discussions of Dey's corporate strategy of transitioning from a generic company to a branded company;
- Forecasting and sales projections for Dey's proposed levalbuterol product;
- Development costs for Dey's proposed levalbuterol product;
- Projected launch dates of Dey's proposed levalbuterol product;
- Discussions with Dey's consultants;
- Negotiation and discussions with Dey's API suppliers; and
- Decision-making processes of Dey's executive management committee.

Mr. Thwaite cites to none of Dey's confidential information in his expert report, and Breath has no need to review Dey's confidential information to understand the substance of that report. Moreover, according to Sepracor's counsel, Mr. Thwaite read Colin Chan's transcripts when preparing his expert report in the Dey case. Mr. Thwaite did not use the information from Dey's deposition to write his report in the Breath case, but felt compelled to list these materials because he had read them for the Dey case.

Breath's aggressive pursuit of this information illustrates the lengths to which it will go in seeking Dey's confidential information. This Court should deny Breath's request for the deposition transcript of Mr. Chan and any deposition exhibits cited therein.

Respectfully,

*/s/ Tiffany Geyer Lydon*

Tiffany Geyer Lydon

TGL/dmf  
185690.1

cc: Richard D. Kirk, Esquire (by hand delivery)  
Jack M. Stover, Esquire (via electronic mail)  
Todd R. Walters, Esquire (via electronic mail)  
Elizabeth A. Leff, Esquire (via electronic mail)

# **EXHIBIT A**

**Buchanan Ingersoll & Rooney PC**  
Attorneys & Government Relations Professionals

**Jayson R. Wolfgang**  
717 237 4852  
jayson.wolfgang@bipc.com

One South Market Square  
213 Market Street, 3rd Floor  
Harrisburg, PA 17101-2121

P.O. Box 12023  
Harrisburg, PA 17101-2023  
T 717 237 4800  
F 717 233 0852  
www.buchananingersoll.com

November 6, 2007

**VIA EMAIL**

Elizabeth Leff, Esquire  
Frommer Lawrence & Haug LLP  
1667 K Street, NW, Suite 500  
Washington, DC 20006

**Re: *Sepracor Inc. v. Dey, L.P. and Dey, Inc.***

Dear Elizabeth:

Sepracor's expert, Edward Thwaite, listed all materials "considered" in connection with his rebuttal expert report in *Sepracor Inc. v. Breath Limited*. Among the items listed, as in his rebuttal expert report in the case against Dey, were the personal and 30(b)(6) depositions of Colin Chan and Exhibits 49, 59, 60, and 74 from those depositions, as well as the expert report of Clive Page from the Dey case. These items have been designated as confidential in the Dey case because they contain or relate to Dey's confidential information. Please note that none of the substance of Dey's confidential information has been disclosed to Breath; the items have simply been listed in compliance with Rule 26(a)(2)(B). Moreover, although Mr Thwaite "considered" the depositions of Mr. Chan and the aforementioned exhibits, he did not specifically rely on them or cite them in support of any opinion.

On November 5, 2007, we received the enclosed letter from Sharon Davis, counsel for Breath, in which she requests, among other things, Mr. Chan's deposition transcripts and exhibits listed in Mr. Thwaite's expert report, as well as an unredacted copy of Clive Page's expert report from the Dey case. Please advise whether Sepracor is authorized by Dey to provide these items to Breath. If not, or if we do not hear from you, we intend to raise this issue with Magistrate Judge Thyng during the call set for this Friday, November 9, 2007. The remaining items requested in Ms. Davis' letter are already on the agenda for that call.

Very truly yours,

s/Jayson R. Wolfgang

JRW/cb  
Enclosure

# **EXHIBIT B**



ROTHWELL, FIGG, ERNST & MANBECK, P.C.

1425 K Street, N.W.  
Suite 800  
Washington, D.C. 20005

Telephone 202-783-6040  
Facsimile 202-783-6031  
www.rfem.com

G. Franklin Rothwell  
E. Anthony Figg  
Barbara G. Ernst  
Harry F. Manbeck, Jr.  
George R. Repper  
Steven Lieberman  
Joseph A. Hynds  
Richard Wydeven  
Martin M. Zoltick  
Minaksi Bhatt  
Sharon L. Davis  
Robert B. Murray  
Jeffrey L. Ihnen  
Glenn E. Karta  
Martha Cassidy, Ph.D.  
Brian S. Rosenbloom  
Jason M. Shapiro

Anne M. Sterba  
Lisa N. Phillips  
C. Nichole Gifford  
Patrick T. Skacel  
Monica C. Kitts  
Brian A. Tollefson  
Joo Mee Kim  
R. Elizabeth Brenner-Leifer  
Adam M. Treiber  
Daniel L. Shores  
Joseph E. Green  
John A. Evans, Ph.D.  
Thomas D. Lyford  
Oliver L. Edwards  
David B. Orange

Of Counsel  
John A. McCahill  
Brian E. Banner

***By Email***

November 5, 2007

Barbara Webb Walker, Esq.  
Buchanan Ingersoll PC  
1737 King Street  
Suite 500  
Alexandria, VA 22314-2727

Re: Sepracor Inc. v. Breath Limited  
Our Reference: 3334-102

Dear Barbara:

Mr. Thwaite's expert report indicates that he relied on numerous materials that have not been produced to Breath. Please produce those materials immediately. The unproduced materials include at least the 30(b)(6) deposition and personal deposition of Colin Chan; all exhibits thereto; Dey's Expert Report of Richard Ahrens; Dey's Expert Report of Chet Leach; Dey's Expert Report of Roger Newton; and an unredacted version of Clive Page's Expert Reports.

Very truly yours,

Sharon L. Davis

SLD:djc